To: Guy Alsentzer[guy@uppermissouriwaterkeeper.org]
Cc: Moon, Dave[Moon.Dave@epa.gov]
From: Laidlaw, Tina
Sent: Mon 4/7/2014 9:04:08 PM
Subject: RE: MT Nutrient Rule Pkg FOIA
EPA Comments on Circular DEQ-12A.pdf
EPA Comments on New Rule 1 and DEQ-12B.pdf
Discharger-specific-Variances-on-a-Broader-Scale-Developing-Credible-Rationales-for-Variances-that-Apply-to-Multiple-Dischargers-Frequently-Asked-Questions.pdf

Guy,

I thought you'd like to see a copy of EPA's comments before our Wednesday call. I've also attached a copy of EPA's Frequently Asked Questions on Multiple Discharger Variances.

I invited Dave Moon, our Region 8 WQS Team Leader, to join us on Wednesday. He is a wealth of knowledge on all things standards so I thought it would be helpful to have him participate.

Let's plan to use my conference call number: [redacted]

Talk to you on Wednesday.

Tina

406-457-5016

From: Guy Alsentzer [mailto:guy@uppermissouriwaterkeeper.org]
Sent: Wednesday, April 02, 2014 10:40 AM
To: Laidlaw, Tina
Subject: Re: MT Nutrient Rule Pkg FOIA

Received the calendar invite - it says a call today vs next week @ the 9th. Assuming the 9th is what was intended, we're all set there.

I'd like to focus on the Rule Package, in particular the variance provisions and leave the TMDL discussion for another day. This is also prudent as my Board has not yet come to a decision regarding your suggestion to withdraw UMW's FOIA concerning the LG TPA TMDLs.

That said, and while it will undoubtably make its way to you in time, I've attached a copy of the comments Upper Missouri Waterkeeper submitted generally supporting but illuminating several critical issues within the Nutrient Rule Package; ideally I'd like to walk through the concerns noted in that letter and hear your / R8's thoughts. If you'd like to bring any of your colleagues in on that conversation after taking a peek at our comments just let me know.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

APR 1 2014

Ref: EPR-EP

Montana Board of Environmental Review
Robin Shropshire, Chairman
Montana Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

Subject: EPA Comments on Montana's Nutrient Standards (Subchapters 2, 5, 6 and 7; Circular DEQ-12A)

Dear Ms. Shropshire:

This letter provides the comments of the Environmental Protection Agency (EPA) Region 8 on Montana Department of Environmental Quality's (MDEQ) draft nutrient rules contained in: 1) Circular DEQ-12A; and 2) Subchapters 2, 5, 6 and 7, ARM 17.30. The EPA received the public notice, published on February 14, 2014. The notice includes information about the proposed water quality standards changes, public hearing information, and invites public comment. The EPA has reviewed the proposed standards and recommends adoption to the Board of Environmental Review (Board).

MDEQ has spent the last decade developing the scientific rationale behind the proposed numeric nutrient criteria for wadeable streams to ensure they are protective of designated uses. The criteria proposed in Circular DEQ-12A and the associated technical documentation[1,2] reflect the MDEQ's commitment to develop scientifically defensible criteria through many years of research and data collection; incorporation of stakeholder and peer review comments; and review of the scientific literature.

The EPA has worked collaboratively with the State to ensure that not only are MDEQ's criteria protective of applicable designated uses and based on sound scientific rationale but also that the State's general and individual variance approaches are consistent with the Clean Water Act and the EPA's implementing regulations. As a general matter, the EPA supports the use of variances,

[1] Suplee, M.W, V.Watson, A.Varghese and J. Cleland. 2008. Scientific and Technical Basis of the Numeric Nutrient Criteria for Montana's Wadeable Streams and Rivers. Helena, MT: Montana Dept. of Environmental Quality.
[2] Suplee, M.W., and V. Watson, 2013. Scientific and Technical Basis of the Numeric Nutrient Criteria for Montana's Wadeable Streams and Rivers—Update 1. Helena, MT: Montana Dept. of Environmental Quality.

as appropriate and consistent with 40 CFR §131.10, to provide time to meet designated uses in certain situations. MDEQ's variance approaches will allow the State and its stakeholders time to implement a phased approach to improve water quality, while retaining the currently applicable designated uses as the long-term goal for the State's rivers and streams. The EPA would like to note that we have also submitted comments to MDEQ on the proposed variance rules and implementing guidance.

We have reviewed the following new water quality standards and support their adoption:

- Proposed numeric total nitrogen and total phosphorus criteria for wadeable streams;
- Proposed numeric total nitrogen and total phosphorus criteria for the Yellowstone River (Bighorn River confluence to the stateline); and
- Proposed reach specific criteria for Flint Creek, Bozeman Creek, Hyalite Creek and the East Gallatin River.

We support MDEQ's recommendation to delay rulemaking for proposed Flathead Lake criteria. The additional time will allow MDEQ to: 1) obtain and analyze the available data for the lake; 2) develop a robust rationale documenting the linkage between the proposed criteria and the designated uses for the lake; and 3) continue collaboration and outreach to local stakeholders and tribal partners. We look forward to working with MDEQ on future rulemaking efforts for Flathead Lake criteria.

Please note that the positions described in our comments, regarding both existing and proposed water quality standards, are preliminary in nature and should not be interpreted as final EPA decisions under Section 303(c) of the Clean Water Act (CWA). If there are questions concerning our comments, please contact Tina Laidlaw (406-457-5016).

Sincerely,

Sandra Spence, Chief
Water Quality Unit

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

APR 1 2014

Ref: EPR-EP

Tracy Stone-Manning, Director
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Re: EPA Comments on Montana's Nutrient Proposals (New Rule 1 Nutrient Standards Variances; Circular DEQ-12B; and Montana's Numeric Nutrient Standards Implementation Guidance)

Dear Ms. Stone-Manning:

This letter provides the comments of the Environmental Protection Agency (EPA) Region 8 on Montana Department of Environmental Quality's (MDEQ) draft nutrient rules contained in: 1) New Rule 1 Nutrient Standards Variances; 2) Circular DEQ-12B; and 3) Montana's Numeric Nutrient Standards Implementation Guidance (Version 1.3).

MDEQ has spent the last decade developing the scientific rationale behind the proposed numeric nutrient criteria for wadeable streams to ensure they are protective of designated uses. MDEQ recognized that meeting the protective criteria could be challenging for dischargers, initiating a stakeholder workgroup to develop implementation tools that would allow dischargers to make incremental progress towards achieving the stringent criteria. As described in the following comments, the Agency is supportive of MDEQ's approach to setting water quality standards for nutrients for the State's rivers and streams, including the adoption of protective numeric nutrient criteria and the accompanying variance regulations. The EPA has worked collaboratively with the State to ensure that not only are MDEQ's criteria protective of applicable designated uses and based on sound scientific rationale, but also that the State's general and individual variance approaches are consistent with the Clean Water Act and the EPA's implementing regulations. As a general matter, the EPA supports the use of variances, as appropriate and consistent with 40 CFR §131.10, to provide time to meet designated uses and associated criteria in certain situations. MDEQ's variance approaches will allow the State and its stakeholders time to implement a phased approach to improve water quality, while retaining the currently applicable designated uses as the long-term goal for the State's rivers and streams. The EPA specifically

supports the use of multiple discharger variances[1], similar to MT's general variance provision, by States and authorized tribes that want to find ways to improve the efficiency of both their WQS adoption and the EPA's review and approval process.

Please note that the positions described in our comments, regarding both existing and proposed water quality standards, are preliminary in nature and should not be interpreted as the final EPA decisions under Section 303(c) of the Clean Water Act (CWA).

The EPA looks forward to discussing any outstanding issues or concerns as the rulemaking process continues. We greatly appreciate the years of hard work by MDEQ and its considerable expertise on this topic. Our detailed comments are summarized below.

EPA COMMENTS

1) Limits of Technology-Based Variances. Section 3 of New Rule I Nutrient Standards Variances (New Rule I) authorizes individual variances if attainment of the criteria is "precluded due to economic impacts or limits of technology, or both."

Under the EPA's water quality standards regulation, adoption of variances may be granted if it can be demonstrated based on site-specific facts and circumstances that the otherwise applicable designated use and criterion or criteria are not feasible to attain during a certain temporary time frame. 40 CFR §131.10(g) sets forth the limited factors that may be used to justify variances. While none of the EPA's 131.10(g) factors include the phrase "limits of technology," such technology limits may be relevant to a demonstration provided under 40 C.F.R. §131.10(g) where water quality-based controls would "result in substantial and widespread economic and social impacts" or if it can be demonstrated that "human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place."

With respect to each of the factors MDEQ has proposed, there may be site-specific circumstances in Montana where it would be reasonable for the Department to consider adoption of discharger-specific individual variances provided the demonstration also shows that a 40 CFR §131.10(g) factor has been met. The decision to issue such an individual variance can only be made by completing a rulemaking to revise the WQS for an individual segment based on review of site-specific information. Each individual variance will be a Montana WQS rule change that must be submitted to the EPA for review and approval pursuant to 40 CFR §131.20(c).

[1] EPA-820-F-13-012. Discharger-specific variances on a broader scale: Developing credible rationales for variances that apply to multiple dischargers. March 2013.

2) Variance Limits Reflective of the Highest Attainable Condition. Department Circular DEQ-12B (DEQ-12B) establishes the following variance limits that apply through May 31, 2016:

Table 12B-1. General variance end-of-pipe treatment requirements per §MCA 75-5 -313(5)(b), through May 2016.

Discharger Category	Monthly Average	
	Total P (µg/L)	Total N (µg/L)
≥ 1.0 million gallons per day	1,000	10,000
< 1.0 million gallons per day	2,000	15,000
Lagoons not designed to actively remove nutrients	Maintain current performance	Maintain current performance

MDEQ has documented that the limits proposed in Table 12B-1 represent "starting point concentrations" that "may not be the lowest concentrations that could economically be achieved by every discharger today."[2] This perspective is further supported by the nutrient reduction steps outlined in MDEQ's Numeric Nutrient Standards Implementation Guidance that suggest further nutrient reductions are feasible. (Implementation Guidance, page 7).

The EPA's position is that variances should specify the interim use(s) and water quality criteria that reflect the highest attainable effluent conditions that require the point source discharge concentration and load to be minimized to the maximum extent attainable so that the highest degree of protection for use classification is achieved. This approach is consistent with the "wherever attainable" caveat to the CWA §101(a)(2) goal. Where appropriate, compliance schedules to achieve the highest attainable effluent condition as soon as possible can be established in the permit.

The EPA's recently Proposed Water Quality Standard Regulatory Clarifications[3] specify two options for defining the highest attainable effluent condition in a variance:

> "a variance must specify (1) the highest attainable interim use and numeric criterion that will apply during the term of the variance or (2) an interim numeric effluent condition that reflects the highest attainable condition for a specific permittee(s) during the term of the variance." [4]

[2] Letter from Richard Opper, MDEQ Director to Jim Martin, EPA Region 8 Regional Administrator, 9 March 2011.
[3] 78 Fed. Reg. 54518, 54533 (Sept. 4, 2013).
[4] 78 Fed. Reg. 54518, 54533 (Sept. 4, 2013).

In its proposed regulations, MDEQ has included an initial set of "end of pipe treatment requirements" (see above) accompanied by an expiration date for the initial phase within the general variance. This expiration is appropriate given that the State statute authorizing the variance, MCA 75-5-313, sets forth end-of-pipe treatment requirements for only that time frame. As the expiration date approaches for the initial set of end-of-pipe treatment requirements to expire, the EPA fully expects MDEQ to readopt the general variance with the next set of phased end-of-pipe treatment requirements, reflecting the highest attainable effluent condition at that time. The EPA is committed to working collaboratively with the State during the general variance readoption process to ensure that at no time are eligible permittees left without coverage under the general variance. The EPA understands that MT's intention is to continue the general variance, as appropriate, until the State's waters attain the numeric nutrient criteria, for up to 20 years from initial adoption. The EPA is supportive of that approach.

3) Variances for New Dischargers. In the Implementation Guidance (middle of page 6), MDEQ defines the scope of the implementation provisions as:

> "The provisions for general, individual, and alternative variances in section 75-5-313, MCA, are available to all discharge permit holders and are not limited to dischargers under permit on the effective dates of MDEQ Circular DEQ-12A or MDEQ Circular DEQ-12B." [underline added]

The EPA's long-standing policy is that variances are authorized only where one of the factors for removing a designated use in 40 CFR §131.10(g) are met. Importantly, all six of the removal criteria are subject to the caveat that only a designated use that is not an existing use may be removed. 40 CFR §131.10(g) specifies that "states may remove a designated use which is not an *existing* use." 40 CFR §131.3(e) defines existing uses as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."

Variances are not authorized in situations where the site-specific facts indicate that existing uses would be impacted. However, the EPA recognizes that there may be situations where it would be possible for a discharger to demonstrate that the variance protects the existing use while providing temporary relief from meeting the underlying water quality standard. In these cases, a variance may be justified.

4) Nutrient Reduction Steps. Section 2 (page 7) of the Implementation Guidance establishes a set of nutrient reduction steps for the three categories of dischargers. The guidance states that:

> "the Department will only supersede the reduction steps defined here if substantial cost reductions for existing technology have occurred, or technological innovations have

allowed for nutrient reductions well beyond the defined steps and those technologies can be readily implemented on wastewater facilities in Montana". [underline added]

The EPA's position is that variance limits reflect the highest degree of pollutant removal attainable. Because those limits have not yet been determined for the three categories of dischargers, we recommend MDEQ strike this sentence from the final Implementation Guidance. In addition, because plant performance may vary greatly and to allow maximum flexibility to achieve the final limits, MDEQ may want to consider simply establishing the final interim variance limit that would apply for each category of discharger instead of outlining specific nutrient reduction steps facilities would be required to meet each permit cycle. The duration of compliance schedules to meet the final limits can be customized based on discharger-specific information.

5) Economic Analysis Exemption for Limits of Technology-Based Variances. MDEQ's Implementation Guidance exempts dischargers applying for an individual variance based on limits of technology from preparing an economic analysis to demonstrate economic hardship. This language is found on page 8 and repeated on page 14:

> "Permittees applying for an individual variance based on discharging at the limits of technology do not have to prepare the economic analysis presented below in **Section 3.1.1**. Rather, they should demonstrate to the Department that the waste treatment system they are proposing can achieve, at a minimum, the nitrogen and phosphorus concentrations shown in **Section 1.2** of this document, and that achieving those concentrations still will not enable them to attain the base numeric nutrient standards at a 14Q5 flow." (middle of page 8)

Because each individual variance will be a Montana WQS rule change that must be submitted to the EPA for review and approval pursuant to 40 CFR §131.20(c), the variance application will need to demonstrate consistency with 40 CFR §131.10(g). As noted in Comment #1, although none of the EPA's 40 CFR §131.10(g) factors include the phrase "limits of technology," such technology limits may be relevant to a demonstration provided under 40 CFR §131.10(g)(6) where water quality based controls would "result in substantial and widespread economic and social impacts."

Dischargers should use the most appropriate 40 CFR §131.10(g) factor to demonstrate they meet the requirements to be eligible for a variance. The guidance language exempting permittees from the federal requirement to provide this demonstration, even in situations where the most appropriate factor is 40 CFR §131.10(g)(6), could result in variances that may not comply with the EPA's regulations.

To address this concern, we recommend MDEQ consider the following modification to the language found on pages 8 and 14.

> EPA-Recommended Language:
>
> "Permittees applying for an individual variance based on discharging at the limits of technology ~~do~~ may not have to prepare the economic analysis. Permittees must demonstrate, based on one of the factors at 40 CFR§131.10(g) that it is infeasible to meet its water quality-based effluent limits based on the applicable designated use and associated criteria."

6) Alternative Variances. MCA 75-5-313(10)(a) and (b) authorize MDEQ to issue an "alternative" variance in situations where the discharger is an "insignificant" source of the nutrient load. MDEQ's Implementation Guidance provides additional detail (pages 16-17) on approaches (e.g., modeling) that can be used to evaluate whether the discharger nutrient contribution is "insignificant" and eligible for an alternative variance.

As noted in the EPA's 2011 letter to MDEQ[5], none of the 40 CFR §131.10(g) factors authorize variances based on *de minimus* considerations; therefore, a variance based on a *de minimus* demonstration would not comply with the EPA's regulations. Instead, *de minimus* situations may be addressed through the development of total maximum daily load (TMDL) allocations pursuant to CWA §303(d). This approach is described in New Rule Section 8 and addresses situations where a TMDL has been approved and the discharger meets the waste load allocation.

7) Detailed Comments on the Implementation Guidance: In addition to the comments summarized in this letter, the EPA has provided a number of edits and formatting changes to the Implementation Guidance using track changes. These comments are intended to help clarify the information in the document or improve readability. The EPA considers these revisions to be non-substantive and intended simply as editorial suggestions.

[5] Letter from Jim Martin, EPA Region 8 Regional Administrator to Richard Opper, MDEQ Director, 16 March 2011.

Conclusion

We hope our comments are helpful to MDEQ and the parties to this rulemaking. We appreciate MDEQ's efforts to address issues of concern to the EPA. If there are questions concerning our comments, please contact Tina Laidlaw (406-457-5016). We look forward to working with the parties to address these issues.

Sincerely,

Sandra Spence, Chief
Water Quality Unit

United States Environmental Protection Agency
Office of Water
Mail Code 4305T
EPA-820-F-13-012
March 2013

Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers

Frequently Asked Questions

DISCLAIMER

These Frequently Asked Questions (FAQs) do not impose legally binding requirements on the EPA, states, tribes or the regulated community, nor do they confer legal rights or impose legal obligations upon any member of the public. The Clean Water Act (CWA) provisions and the EPA regulations described in this document contain legally binding requirements. These FAQs do not constitute a regulation, nor do they change or substitute for any CWA provision or the EPA regulations.

The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of these FAQs and the appropriateness of their application to a particular situation. The EPA retains the discretion to adopt approaches on a case-by-case basis that differ from those described in these FAQs where appropriate. These FAQs are a living document and may be revised periodically without public notice. The EPA welcomes public input on these FAQs at any time.

1. Why is the EPA issuing these FAQs?

The EPA is issuing these FAQs to help address questions that arise when states and tribes[1] seek to streamline the adoption and approval of water quality standards (WQS) variances for pollutants that have an impact on multiple permittees (or dischargers). This occurs when groups of permittees are experiencing the same challenges in meeting their water quality based effluent limits (WQBELs) for the same pollutant, regardless of whether or not the permittees are located on the same waterbody. States and tribes that want to find ways to both improve the efficiency of their WQS adoption and approval process, and provide permittees with as much certainty as possible regarding their ultimate discharge requirements, may find these FAQs particularly helpful. While the EPA realizes there may be further questions about the implementation of multiple discharger variances, these FAQs

[1] "Tribal" and "tribes" refers to tribes authorized for treatment in a manner similar to a state (TAS) under section 518 of the Clean Water Act (CWA) for purposes of CWA section 303(c) water quality standards (WQS).

are designed to help states and tribes evaluate the appropriateness of using a multiple discharger variance approach.

The federal water quality standards regulations at 40 CFR 131 and the federal permitting regulations at 40 CFR 122 provide for a number of tools for states and tribes that offer regulatory flexibility when implementing water quality management programs. These tools include site-specific criteria, revisions to designated uses, dilution allowances, permit compliance schedules, and WQS variances. Which regulatory tool is appropriate depends upon the circumstances.

2. What is a water quality standards variance?

A water quality standards variance is a time limited designated use and criterion (i.e., interim requirements) that is targeted to a specific pollutant(s), source(s), and/or waterbody segment(s) that reflects the highest attainable condition[2] during the specified time period. As such, a variance requires a public process and EPA review and approval under CWA 303(c). While the designated use and criterion reflect what is ultimately attainable, the variance reflects the highest attainable condition for a specific timeframe and is therefore less stringent.[3] However, a state or tribe may adopt such interim requirements only if it is able to demonstrate that it is not feasible to attain the currently applicable designated use and criterion during the period of the variance due to one of the factors listed at 40 CFR 131.10(g).[4] Where the currently applicable designated use and criterion are not being met, WQS variances that reflect a less stringent, time limited designated use and criterion allow states, tribes and stakeholders additional time to implement adaptive management approaches to improve water quality, but still retain the currently applicable designated use as a long term goal for the waterbody. States have adopted, and EPA has approved, water quality standards variances that apply to individual dischargers, variances that apply to multiple dischargers, and variances that apply to entire waterbodies or segments.

The interim requirements specified in the variance apply only for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the pollutant(s), permittee(s) and /or waterbody or water body segment(s) covered by the variance. Specifically, the variance serves as the basis for the WQBEL in National Pollutant Discharge Elimination System (NPDES) permits. However, the interim requirements *do not replace* the designated use and criteria for the water body as a whole, therefore, any implementation of CWA section 303(d) to list impaired waters must continue to be based on the designated uses and criteria for the waterbody rather than the interim requirements.

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[2] The highest attainable condition is the condition that is both feasible to attain and is closest to the protection afforded by the designated use and criteria.

[3] While variances are described as "time limited" and designated uses are implied to be "permanent," 40 CFR 131.20 requires that states and tribes hold public hearings for the purpose of reviewing the applicable water quality standards, including designated uses, and modifying them as appropriate.

[4] See Section 5.3 of the *Water Quality Standards Handbook EPA 823 B 94 005a, August 1994; Advanced Notice of Proposed Rule Making, Water Quality Standards Regulation, July 7, 1998 63 FR 36759.*

3. When might a state or tribe want to adopt a WQS variance?

Many states and tribes have found that WQS variances are useful to consider when there is a new or more stringent effluent limit[5] as long as the state or tribe can also provide a demonstration that attaining the designated use and criterion is not feasible for the term of the variance, but the designated use and criterion may be attainable in the longer term. Example situations of when a variance may be appropriate include when:

- Attaining the designated use and criterion is not feasible under the current conditions (e.g., water quality-based controls required to meet the numeric nutrient criterion would result in substantial and widespread social and economic impact) but could be feasible should circumstances related to the attainability determination change (e.g., development of less expensive pollution control technology or a change in local economic conditions); or
- The state or tribe does not know whether the designated use and criterion may ultimately be attainable, but feasible progress toward attaining the designated use and criterion can still be made by implementing known controls and tracking environmental improvements (e.g., complex use attainability challenges involving legacy pollutants).

Properly applied, a WQS variance can lead to improved water quality over the duration of the variance and, in some cases, full attainment of designated uses due to advances in treatment technologies, control practices, or other changes in circumstances, thereby furthering the objectives of the CWA.

4. What is the legal basis for a WQS variance?

The CWA specifies an interim goal that, "wherever attainable," water quality provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water. In implementing the CWA, the regulation at 40 CFR 131.10 establishes how a state or tribe may demonstrate that uses specified in CWA section 101(a)(2) or subcategories of such uses are not feasible to attain. In 1977, an EPA Office of General Counsel legal opinion considered the practice of temporarily downgrading the WQS as it applies to a specific permittee rather than permanently downgrading an entire water body or waterbody segment(s) and determined that such a practice is acceptable as long as it is adopted consistent with the substantive requirements for permanently downgrading a designated use. In other words, a state or tribe may change the standard in a more targeted way than a designated use change, so long as the state or tribe is able to show that achieving the standard is "unattainable" for the term of the variance. The state practice described in the Office of General Counsel legal opinion became known as adopting a "variance" to a water quality standard.

The EPA's regulation at 40 CFR 131.13 provides that variance policies are general policies affecting the application and implementation of WQS and that states and tribes may include variance policies in their state and tribal standards, at their discretion.[6] The EPA interprets its

[5] For example, when dischargers are faced with new or revised criteria, and/or when a reasonable potential analysis shows the need for a water quality based effluent limit.

[6] Section 40 CFR 131.13 further provides that such policies are subject to EPA review and approval.

regulation to authorize the use of a WQS variance where a state or tribe meets the same procedural and substantive requirements as removing a designated use. Therefore, variances can be granted based on any one of the six factors listed at 40 CFR 131.10(g).

5. What are the factors a state or tribe can use to justify the need for a water quality standards variance?

As provided in §131.10(g), states and tribes "may remove a designated use which is *not* an existing use, as defined in 40 CFR 131.3, or establish sub-categories of a use if the state or tribe can demonstrate that attaining the designated use is not feasible because:

(1) Naturally occurring pollutant concentrations prevent the attainment of the use; or

(2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or

(3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or

(4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or

(5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact."

6. What is a Multiple Discharger Variance?

If a state or tribe believes that the designated use and criterion are unattainable as they apply to multiple permittees because they are all experiencing challenges in meeting their WQBELs for the same pollutant(s) for the same reason, regardless of whether or not they are located on the same waterbody, a state or tribe may streamline its WQS variance process. To do so, the state or tribe would adopt one variance that applies to all of these permittees (i.e., a multiple discharger variance) so long as the variance is consistent with the CWA and implementing regulation at 40 CFR 131.10 (for example, all the dischargers in the group cannot meet the required WQBEL to protect aquatic life for a period of time due to substantial and widespread economic and social impact).

The EPA recognized the utility of a multiple discharger variance, and its distinction from an individual discharger WQS variance in the "Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID; EPA–820–B–95–001; March 1995, p.

238). The EPA also spoke to the use of multiple discharger variances in the "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule." 75 Fed. Reg. 75762, 75790 (December 6, 2010). It is important to note that multiple discharger variances may not be appropriate or practical for all situations, and may be highly dependent on the parameters considered and the number of affected permittees.

7. What should a state or tribe keep in mind when justifying the need for a multiple discharger variance?

In developing an analysis to justify the need for a multiple discharger variance, states and tribes should consider the following three principles. The variance and the justification:

(1) Must meet the same 40 CFR 131 regulatory requirements as an individual discharger WQS variance, and should consider any EPA guidance. Specifically, the state or tribe must fully demonstrate that a factor listed in 40 CFR 131.10(g) precludes attainment of a use specified in CWA 101(a)(2) for the entire variance period. When using 40 CFR 131.10(g)(6), this means that the documentation provided to support the variance must address both the substantial AND widespread components of the economic and social impacts of attaining the designated use and criterion.

(2) Should ensure that any overall demonstration is conducted in a manner that accounts for as much individual permittee information as possible. A permittee that could not qualify for an individual WQS variance should not qualify for a multiple discharger variance. The demonstration should:

- Apply only to permittees experiencing the same challenges in meeting WQBELs for the same pollutant(s), criteria and designated uses.
- Group permittees based on specific characteristics or technical and economic scenarios that the permittees share (e.g., type of discharger (public or private), industrial classification, permittee size and/or effluent quality, treatment train (existing or needed), pollutant treatability, available revenue, whether or not the permittee can achieve a level of effluent quality comparable to the other permittees in the group, and/or waterbody or watershed characteristics) and conduct a separate analysis for each group.[7] The more homogeneous a group is in terms of factors affecting attainability of the designated use and criterion, the more credible the multiple discharger variance will be.
- Collect sufficient information for each individual permittee, including engineering analyses and financial information, to adequately support the specification of permittee groups for each individual permittee to be covered by the variance (e.g. estimated costs that each permittee may experience, permittee specific revenue).

[7] The EPA recommends that the state or tribe develop a separate variance for each group (even when going through the same rulemaking procedure) so that if questions arise for one group, it does not jeopardize approval for the others.

(3) Should consider an individual variance for a particular permittee if it does not fit with any of the group characteristics (e.g., private vs. public dischargers, large vs. small permittee, or permittees with a parent company vs. those without).

8. What should a state or tribe keep in mind when adopting a multiple discharger variance pursuant to state/tribal law?

Any multiple discharger variance should:

(1) Include a justifiable expiration date, consistent with the analysis provided, for each permittee or group of permittees covered by the variance. After the expiration date, each permittee in the group will be subject to the applicable water quality standards, or obtain EPA approval on a variance renewal. If the variance will expire during the permit term, the permitting authority must either include an appropriate WQBEL that will apply at the expiration of the variance or include a reopener clause such that the WQBEL may be revised in order for that permit to derive from and comply with WQS the entire permit term.

(2) Provide that any renewal of a multiple discharger variance includes a new demonstration that the designated use and criterion are not feasible to attain during the term of the renewed variance, and documentation of the feasible progress that has been made by each permittee covered by the renewal. In addition, individual permittees will be reevaluated to determine if they continue to qualify under their group designation. Permittees that no longer qualify will cease to be covered by the multiple discharger variance.

It is important to note that even though the duration of a variance may be longer than 3 years, a variance is a water quality standard that must be reviewed every 3 years, consistent with 40 CFR 131.20 (a).

9. What must a state or tribe keep in mind when determining the appropriate interim requirements for a multiple discharger variance?

As with any WQS variance, the interim requirements will need to reflect the highest attainable condition during the term of the variance. The highest attainable condition may be expressed as the highest attainable interim use and criterion[8] or highest attainable effluent

[8] Section 131.6(a) requires that each state's water quality standards submitted to EPA for review must include "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." CWA section 101(a)(2) establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water," wherever attainable. Section 303(c)(2)(A) requires state water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]." EPA's regulations at 40 CFR part 131 interpret and implement these CWA provisions as creating a "rebuttable presumption" that requires state water quality standards to provide for all of the uses specified in Section 101(a)(2) of the Act, unless those uses are shown by a use attainability analysis to be unattainable. Section 131.10(g) and 131.10(j) authorizes a state to remove protection for a use specified in 101(a)(2) (or subcategory of such a use) if the state can demonstrate that one of the attainability factors is met. Once the presumption is rebutted, the state must still adopt, under 131.6(a), "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." In order to comply with this provision, stateswill

condition for a permittee(s) during the term of the variance. For example, this could be accomplished by specifying in the variance a numeric value that reflects the highest water quality that a discharger could achieve (beyond their technology-based effluent limits) during the term of the variance.[9] In general, interim requirements should be established on a permittee specific basis (particularly when demonstrating that the applicable designated use is unattainable based on 40 CFR 131.10(g)(6)), but there may be instances where establishing requirements for a group of permittees may be appropriate (e.g., with "legacy pollutants", or when hydrologic conditions have been modified). EPA notes that some states have included additional interim requirements, such as requirements to research advances in wastewater treatment or improved management practices, to conduct wastewater treatability studies, to define demonstrated performance of wastewater treatment or other control methods.

need to adopt designated uses that continue to serve the 101(a)(2) goal by protectingfor the highest attainable use unless the state has shown that no use specified in 101(a)(2) or no subcategory of such uses are attainable.

[9] This is a reasonable alternative to adopting an interim designated use and criterion because the resulting instream concentration reflects the highest attainable interim use and interim criterion.